

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 PORTLAND DIVISION

4 UNITED STATES OF AMERICA,)

5 Plaintiff,)

Case No. 3:12-CR-00431-HA

6 v.)

March 3, 2014

7 DAVID JOSEPH PEDERSEN, a/k/a)

8 "JOEY" PEDERSEN, and HOLLY ANN)

9 GRIGSBY,)

Portland, Oregon

10 Defendants.)

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14 MOTION HEARING

15 TRANSCRIPT OF PROCEEDINGS

16 BEFORE THE HONORABLE ANCER HAGGERTY

17 UNITED STATES DISTRICT COURT SENIOR JUDGE
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TRANSCRIPT OF PROCEEDINGS

MS. SHOEMAKER: Good morning, Your Honor. Calling Case No. 3-12-CR-431. United States v. David Joseph Pedersen and Holly Ann Grigsby. I'm Jane Shoemaker, for the United States, and with me is Amanda Marshall, United States Attorney, and Assistant United States Attorneys Scott Asphaug and Hannah Horsley. The defendants are present, in custody, with their attorneys. For Mr. Pedersen, Rene Manes and Rich Wolf are both present. For Ms. Grigsby, Ms. Bender and Ms. Correll with both present. This matter is on for a status hearing.

Originally, two motions were set to be heard, but I believe they are both moot at this time, which would be Mr. Pedersen's pro se motion to compel discovery number 360, which I believe the Court has entered an order finding that moot, and the Government's motion to delay ruling on the bad faith finding, any bad faith finding, until after a decision was made on the death penalty motions, which was 347.

The Court has set hearings -- further hearings regarding the -- any finding of a bad faith, pursuant to the defendant's oral motions, and Mr. Asphaug or Ms. Marshall will address the remaining issues.

Relating to those motions, in addition, on Friday afternoon Holly Grigsby's attorneys filed a motion to continue the trial date, and I am prepared to respond to

1 that motion in whichever order the Court would like to hear
2 the matters.

3 THE COURT: Well, I understood from Ms. Grigsby's
4 motion, through her attorney, that the Government did not
5 oppose the motion to continue; however, Mr. Pedersen,
6 through his attorneys, have indicated that they, in fact, do
7 oppose a continuance.

8 With those statements in the motion, I think the Court
9 understands the various parties' positions, and I think at
10 this time it's unclear exactly how much additional discovery
11 is going to be provided, and therefore I'm not certain that
12 Defendant Grigsby cannot be prepared in light of the fact
13 that Defendant Pedersen will be prepared.

14 So I'm going to deny that motion at this time and leave
15 the trial date as scheduled.

16 Now, of course, as the additional material is provided,
17 if it appears that that July trial date is unworkable, then
18 that would have to be brought to the Court's attention at a
19 later time; but at this time the Court is going to deny the
20 motion for a continuance.

21 MS. SHOEMAKER: Thank you, Your Honor.

22 And in view of the fact that the case will be going
23 forward to trial on July 7th, at least as of now, the
24 Government would request that the Court set dates for the
25 filing of pretrial motions and hearings. We had proposed a

1 number of dates to the defense earlier. We've talked about
2 having two rounds of pretrial motions. One would be
3 substantive motions to dismiss or motions to suppress, and
4 the Government is particularly concerned and would like to
5 have heard in that first round of motions any objections to
6 the Government's proposed recorded statements of the
7 defendants that it intends to offer at trial.

8 With the exception of a limited number of Yuba City
9 jail recordings, we don't intend to offer any other jail
10 recordings at trial. But there are many hours of recorded
11 interviews between the defendants and law enforcement, as
12 well as statements, where the defendants were talking to one
13 another, not during an interview with law enforcement, but
14 being recorded, with their knowledge, while they were in
15 Yuba City. And the Government will identify the
16 statements -- the portions of the statements that it intends
17 to use; the statements of the defendants to law enforcement
18 that we intend to offer at trial and propose transcripts of
19 those statements by March 21st.

20 And we are requesting that in that first round of
21 motions the defense be required to identify any objections
22 they have to the portions of the conversations that we
23 intend to offer at trial, as well as any objections to the
24 transcripts.

25 The Government is proposing that those motions, as well

1 as motions to suppress and dismiss, be filed on April 4th,
2 the Government's response is on April 18th, replies on
3 April 25th, and then a hearing on the motions, we would
4 propose, if the Court is available, on May 2nd.

5 Then --

6 THE COURT: Let me interrupt you, Ms. Shoemaker.
7 If I understand you correctly, you wish to identify the
8 recordings by March 21st and then give the defendants
9 roughly two weeks to identify which of those they're going
10 to file objections -- motions against and actually file the
11 motions by April 4th?

12 MS. SHOEMAKER: Yes, Your Honor. These were
13 recordings that were provided in discovery a long time ago.
14 We're simply narrowing down the statements that we actually
15 intend to offer at trial.

16 The reason we want to have this litigated early in the
17 case is because once we obtain rulings from the Court on the
18 admissibility of those particular statements we're going to
19 need to redact the videos and the recordings and the
20 transcripts and sync them for presentation at trial, and
21 that's a very time-consuming process for our litigation
22 support. And so we want to ensure that we have rulings on
23 that as far in advance of trial as possible, so they have
24 time to complete those redactions and syncing of those
25 recordings. And hopefully we'll have that all ready before

1 our trial exhibits, our binders, are due to be presented to
2 the Court and to the defense, along with our trial
3 documents.

4 So we've also -- we're proposing an early scheduling
5 for filing the pretrial documents, as well.

6 So all of these issues can be taken care of well in
7 advance of trial, and any additional motions in limine could
8 be filed along with the regular pretrial documents, as we
9 normally do.

10 THE COURT: I may have missed it, but if the
11 defendants were to file their motions by April 4th, what
12 time frame would the Government have to respond to the
13 motions?

14 MS. SHOEMAKER: We're proposing a two-week
15 response time for us to respond. And this would include
16 their motions to dismiss and their motions to suppress.

17 THE COURT: And we would still need to schedule a
18 date for a hearing?

19 MS. SHOEMAKER: And the Government's proposing
20 May 2nd.

21 THE COURT: Okay. Ms. Manes?

22 MS. MANES: Good morning, Your Honor. Rene Manes
23 here with my co-counsel, Mr. Wolf, on behalf of
24 Mr. Pedersen.

25 First, I would like to ask a preliminary issue, which

1 is there is one matter that was originally scheduled for
2 hearing on the 19th and then on the February 7th date that
3 I'm not sure has been taken care of, and that was the motion
4 to unseal the Government's filing regarding
5 Detective Steele. The Government had filed that under seal
6 in -- on December, I believe, 18th or 19th, of last year.
7 We had moved to unseal the material. The Government had
8 originally objected.

9 I understand they withdrew their objection in a filing
10 on February 6th. We have never seen an order technically
11 lifting the sealing of the Detective Steele material, and
12 therefore, as one issue today, we would like to just confirm
13 that the orders of December 19th that precluded -- both
14 sealed the information and also precluded us from discussing
15 it with anyone, have, in fact, been lifted.

16 THE COURT: One second. Mr. Huseby advises me
17 that his recollection is that the Government's response was
18 filed publicly, which means that sort of is already in the
19 public domain.

20 Ms. Shoemaker?

21 MS. SHOEMAKER: Yes, Your Honor. The Government
22 filed a supplemental response to Defendant Pedersen's motion
23 for reconsideration of the orders sealing that notice and
24 precluding disclosure of it. And when we filed that
25 supplemental response, which is Docket 367, we filed it

1 under seal.

2 However, the Court then drew a line through "filed
3 under seal," and initialed that. And attached to that
4 supplemental response was our proposed redacted notice. So
5 it was our understanding that when the Court redlined "filed
6 under seal" that made the notice, in redacted form, become
7 public filing. And then it was publicly filed under that
8 docket number 367 on February 6th.

9 MS. MANES: I just wanted to confirm for the
10 record that no party is any longer bound by the
11 December 19th orders regarding the Detective Steele issues.

12 In terms of other issues raised by Ms. Shoemaker, in
13 terms of the trial scheduling motions, I'm not sure that the
14 parties are prepared to go forward with specific dates at
15 this time.

16 I will note that in the order scheduling the trial for
17 July 7th there was also a scheduling date for motions of
18 June 16th.

19 In our conversations with the Government, their concern
20 was June 16th did not allow sufficient time for motions that
21 are more substantive, such as motions to dismiss or motions
22 to suppress, that perhaps the June 16th motion order would
23 be better served for trial motions, such as motions in
24 limine.

25 We could certainly agree and discuss appropriate dates

1 for substantive motions.

2 I will say that from our perspective the Court has
3 scheduled an evidentiary hearing on April 7th, 8th, 9th. I
4 think prior to that evidentiary hearing, that is going to be
5 where the defense team's efforts are focused, and we're not
6 going to be able to address, prepare, and be ready to file
7 on any substantive motions certainly prior to that date and
8 probably for a few weeks afterwards.

9 I would think that a filing of a substantive motion
10 date on around the first week in May or maybe even the first
11 Monday of the second week in May would give this Court an
12 opportunity to have briefing and then a hearing on
13 substantive motions in early June, with trial documents
14 filed June 16th, if that's all right with the Court's
15 calendar. But that should allow sufficient time, I think,
16 for all of the parties, both to brief these issues and then
17 for the work to be done for preparation of trial on July
18 7th.

19 THE COURT: Somehow or another Mr. Moore knew I
20 had an outdated calendar.

21 You can proceed, Ms. Correll.

22 MS. CORRELL: Your Honor, one of the reasons that
23 I filed a motion to continue on behalf of Ms. Grigsby is
24 that we were advised last week, during our conferral with
25 the U.S. Attorney's Office, that they had not completed

1 their audit of -- I think they had completed the audit of
2 the OSP materials, but not the FBI materials.

3 The audit of the OSP materials turned up 27 banker
4 boxes' worth of stuff that Ms. Bender is going to start
5 going through this week with our paralegal Sergio Perez.

6 I don't know -- I haven't been advised of any update on
7 the FBI audit.

8 It just seemed to me, hearing that, that that, in and
9 of itself, made the current trial date unrealistic. And I
10 think it's still unrealistic. And it seemed, to us, that
11 bumping it to the end of September would work for the
12 parties and allow a less frenetic pretrial litigation and
13 trial preparation.

14 Now, I mean, I can certainly refile something once
15 we've looked at the 27 banker boxes, but we're still -- we
16 don't have a date on the FBI audit. We don't know what's
17 going on with the investigation of Detective Steele. We
18 don't have any update on that. So it just seemed like there
19 were a lot of balls up in the air that clearly indicated
20 that July was not going to be workable.

21 Now, certainly, I can come back and bring this up
22 again, but it seemed, to me, like we were all here, and I
23 think the Government was not going to oppose our request,
24 because I think they understand the situation that that puts
25 us in; having, you know, 27 boxes of new discovery to look

1 through at this particular point in time.

2 It's got to be scanned. You know, we have to have our
3 investigators look at it, we have to determine what
4 additional investigation needs to be done, how it's going to
5 impact the pretrial motions that are going to be filed, so
6 it was really, you know, on that basis that I -- I just
7 thought I'm going to file this motion so we can have a
8 discussion about it today with you. But that's -- that's
9 still my opinion, Judge, that that -- because of those 27
10 new boxes of material, it's going to make the trial -- the
11 July trial date really difficult to make.

12 THE COURT: Ms. Shoemaker?

13 MS. SHOEMAKER: Your Honor, I wanted to provide an
14 update in response to Ms. Correll's comments. Our office,
15 as part of the audit, did remove all the material from OSP.
16 And by next week we will have either provided or made
17 available for the defense inspection and copying everything
18 from OSP and the FBI. This week we're currently redacting
19 the OSP master reports and the property reports and expect
20 to produce those for the defense this week.

21 I should say that of the items, both these master
22 reports and the 27 boxes of material from OSP, that we
23 believe that it is largely duplicative of material that they
24 already have.

25 The 27 boxes from OSP does include electronic media.

1 It's largely duplicate jail calls and scanned correspondence
2 from the jails, a number of reports, and things, that are
3 the working copies, so we don't expect that much of that is
4 actually going to be new material. But, in an abundance of
5 caution and to expedite the defendant's review of that
6 material, we have decided to make it available for them to
7 come over, go through the material, and let us know anything
8 they want us to reproduce for them.

9 As I mentioned earlier this morning, we have also
10 decided that we are not going to be offering any of the jail
11 calls at trial, other than a limited number of the jail
12 recordings while they were at Yuba City County Jail.

13 So we do -- I mean, we did, you know, take that
14 position. We were not going to oppose Ms. Grigsby's request
15 for a continuance because we understand the concerns they
16 have regarding the discovery, but we'll also be prepared to
17 go to trial on July 7th, as scheduled.

18 Our concern with the dates that Ms. Manes was proposing
19 is if we don't wind up having a hearing on -- if the motions
20 aren't even filed until sometime in May and then we file our
21 response and then the Court has a hearing and Court has time
22 to digest this and rule on that, we're not going to
23 get -- likely have rulings until weeks or a month before
24 trial, which makes it very difficult for our office to be
25 able to redact those transcripts and recordings and sync

1 them in time for trial and certainly in time to include in
2 the binders with the trial exhibits.

3 Also, our understanding from the original dates the
4 Court had set for pretrial matters, we understood that to be
5 the hearing on those motions and that the pretrial motions
6 would be filed sometime prior to that, where we have an
7 opportunity to file responses and the Court's going to have
8 time to rule on those matters sufficiently in advance of
9 trial that the parties know what evidence is going to be
10 coming in, and to adjust, based on the Court's ruling, to be
11 able to submit our pretrial documents.

12 So, again, our primary concern with the pretrial
13 motions is getting any objections ferreted out and the
14 rulings on those with regard to the recorded statements and
15 transcripts. But it makes sense to us, as well, that any
16 motion to dismiss or suppress also be litigated well in
17 advance of trial.

18 I understand that there are going to be hearings. The
19 hearings have been bifurcated, but the reason it's been put
20 off until April is simply over scheduling issues between the
21 parties and the Court. These have been ongoing matters that
22 have been litigated, and it just seems to us if we're going
23 to trial in four months that we shouldn't be putting off the
24 motions until the month before trial.

25 THE COURT: With your limiting the recordings to

1 the Yuba City communications between the defendants, do you
2 know how many minutes or hours these recordings are composed
3 of?

4 MS. SHOEMAKER: I don't know exactly how many.
5 It's really hard to estimate. I -- there are a lot. When I
6 listened to them -- there weren't transcripts at that time,
7 but I would say it took me over a hundred hours to listen to
8 them. But that was a lot of stopping and going back to hear
9 what was being said, because I didn't have the benefit of
10 transcripts.

11 So I don't know how many hours there are. We certainly
12 aren't going to be offering near that many. But it's still
13 going to be -- we haven't decided exactly which ones yet,
14 and we'll be deciding that over the next couple of weeks.

15 But it -- it is going to take some time to redact those
16 and sync the transcripts, and we don't know what the
17 defense's position is going to be on the portions that are
18 being offered, but it seems, to us, that it would be good to
19 resolve those issues well in advance of trial.

20 THE COURT: Well, my initial thought, and that's
21 why I sort of walked through the dates, is if you don't plan
22 on producing this material until March 21st, the April 4th
23 date would not, in my opinion, give the defendant a
24 sufficient period of time to adequately go through them to
25 file motions by April 4th.

1 So I'll take the matter under advisement, but I'm
2 pretty much telling you right now that those dates are not
3 going to work. So I don't know what the Government is going
4 to do insofar as getting the material to the defendant
5 sooner than the March 21st date or possibly preparing
6 exhibits once the trial has commenced, but that -- that
7 date's -- okay, the April 4th date I don't think is going to
8 work.

9 There was also a motion -- number 248 -- to have this
10 matter, insofar as discovery, assigned to a magistrate
11 judge. I'm going to deny that request, because I don't
12 think it would be appropriate to have duplication of
13 efforts; send it to the magistrate and having a magistrate
14 make findings and recommendations and having me review it
15 from that standpoint. So that request by the Government is
16 going to be denied.

17 In the most recent filing, there was another request
18 for an additional line of discovery, and this pertains to
19 the -- what's referred to as the Blue Book.

20 This morning the Court read through the recent lawsuit
21 that was filed in the U.S. District Court in the District of
22 Columbia. It's *National Association of Criminal Defense*
23 *Lawyers v. The Executive Office of U.S. Attorney's Office*.
24 That's number 14-269.

25 In that complaint, which is a freedom of information

1 declaratory judgment proceeding, a lot of the objections
2 that are raised in this Court, insofar as the production,
3 have been stated, and in Defendant Grigsby's motion, they
4 proposed that the document could be produced in accordance
5 with a protective order.

6 I don't know if the Government has actually considered
7 that, but I guess we could throw it open to Mr. Asphaug.

8 MR. ASPHAUG: Yeah. Thank you, Your Honor. The
9 difficulty that I've had this morning is that Washington,
10 D.C., is having yet another snowstorm, so I have not been
11 able to confer with counsel at the Executive Office of the
12 United States Attorney to get their position, and it's their
13 document.

14 However, here's what we can tell the Court: The Blue
15 Book, as it's called, we do object to that document being
16 used, because we believe that there are adequate alternative
17 documents available publicly to the defendant to get all the
18 same material. First, there's the Ogden memo.

19 THE COURT: I'm sorry. Which memo?

20 MR. ASPHAUG: First there's a memo called the
21 Ogden memo from January 4th, 2010. That is a memo to all
22 U.S. Attorneys' Offices and Justice Department components
23 related to the production of discovery in criminal cases.
24 That is publicly available. We will make a link to that
25 document available to the defendants at the conclusion of

1 this hearing.

2 In addition, there is another document called the
3 September 12 USA Bulletin on Criminal Discovery. That is,
4 again, another public document related to criminal
5 discovery, and we believe that it encompasses essentially
6 the same material, but it is not an internal document that
7 the United States wishes to protect.

8 The last matter is recommendations for electronic
9 discovery in federal criminal cases. That was drafted by
10 the Joint Electronic Technology Working Group, which
11 included members of the defense bar. That is another
12 document that is publicly available.

13 The last document that we have not discussed with
14 defense, but we can discuss now, relates to a direction to
15 the United States Attorneys' Offices in what I've described
16 as the Ogden memo. That Ogden memo directed United States
17 Attorneys' Offices in each district to draft their own
18 criminal discovery policies and the United States Attorney's
19 Office for the District of Oregon in 2011 did draft such a
20 document, and we are prepared to make that available to the
21 defense, under a protective order, with a limited redaction
22 as it relates to national security issues, where there's a
23 section related to national security issues, and we would
24 like to propose to the Court that we redact that, show it to
25 the Court in camera, under seal, and allow the Court to

1 assist us in that process before we make it available to the
2 defendants.

3 So we're prepared to offer all those documents in lieu
4 of additional litigation on whether this Blue Book should be
5 provided to the defense in anticipation of next week's
6 hearing.

7 THE COURT: Ms. Correll?

8 MS. CORRELL: Your Honor, it's difficult, without,
9 obviously, knowing what is in the Blue Book, how it would be
10 different than the materials that Mr. Asphaug suggests. I
11 know that the discovery of the Blue Book was created after
12 the discovery debacle in Senator Ted Stevens' case. The
13 Blue Book was created to ensure that those types of errors
14 didn't happen again in other criminal cases. I think that a
15 protective order -- we were certainly willing to be bound by
16 it -- would be very useful to know the actual
17 Attorney General's position on how criminal discovery should
18 be handled.

19 I can't imagine that he created it to have no other
20 material than what is publicly available. And so I am not
21 sure what interest of the DOJ's is not protected by a
22 protective order, which you could issue, which would make
23 it -- you know, we could have a discussion about it under
24 seal. If there needs to be questions about it, that portion
25 of the hearing could be sealed. Perhaps we could be

1 requested to give our copy back at the end of our use of it
2 at the hearing.

3 It just seems, to me, that this U.S. Attorney's
4 Office's ability to follow national policy and
5 recommendation given out by the Attorney General is relevant
6 to a good faith or bad faith argument, and so that's why we
7 requested it.

8 I know that they don't want to disclose it, but I think
9 a protective order would address all the issues that they
10 are concerned about.

11 THE COURT: Do you wish to be heard, Ms. Manes or
12 Mr. Wolf?

13 MS. MANES: No, Your Honor. Thank you.

14 THE COURT: Mr. Asphaug, do you know approximately
15 how many pages this Blue Book contains?

16 MR. ASPHAUG: The Blue Book is approximately an
17 inch to an inch-and-a-half thick, so I'm going to say 200
18 pages, perhaps.

19 I do also -- I did also forget to note that the U.S.
20 Attorneys' Manual, Section 9-5.001 et. seq., is also
21 available to the defendants, and they've cited it in this
22 matter. That is the criminal discovery portion of the U.S.
23 Attorneys' Manual.

24 THE COURT: Just for the Court's edification, as I
25 read through the complaint -- and obviously it's from the

1 plaintiff's point of view, but in that complaint they assert
2 that the Government relies on the work product privilege,
3 which U.S. Attorney's Office here has asserted, as well as
4 the deliberative process privilege.

5 But I didn't see in any of the materials, files in this
6 case, that the Government's also relying on the deliberative
7 process privilege.

8 MR. ASPHAUG: We did not discuss it, and I did not
9 have an opportunity -- this was raised in Friday's
10 conferral. So at the time that I made our objection, I had
11 not read the opinion. I had not made seen what the
12 Government had filed in response.

13 THE COURT: They have not filed anything in D.C.

14 MR. ASPHAUG: We would rely on all privileges
15 available to us, including a deliberative process privilege.

16 THE COURT: Do you wish to brief that further,
17 because, in my reading of just the complaint, as well as my
18 understanding of those two privileges, I was wondering how
19 they would fit in a discovery request when -- well, I'm just
20 wondering --

21 MR. ASPHAUG: Yes. We would brief that issue,
22 Your Honor, if the Court would give us a little bit of time.

23 THE COURT: End of the week?

24 MR. ASPHAUG: Yes. Thank you. We are still
25 prepared, however, to turn over the material that I've

1 mentioned. I think I said in lieu of --

2 THE COURT: As I heard Ms. Correll, she's not
3 necessarily interested in any of that material. She wants
4 the Blue Book.

5 MS. CORRELL: That's correct.

6 MR. ASPHAUG: Well, then we won't. Thank you,
7 Your Honor.

8 THE COURT: All right. There's another matter
9 that the Court just wants to be clear on, and that is there
10 was a question as to whether or not Ms. Marshall and
11 Mr. Asphaug could represent the Government at the
12 evidentiary hearing with respect to the Sixth Amendment
13 allegations.

14 Defendant Pedersen indicates that they have no
15 objection as long as they can still call Ms. Marshall and
16 Mr. Asphaug as witnesses at that hearing. The Court's
17 review of the professional responsibility Rule 3.7
18 references during the trial that an attorney should not be
19 both a witness and a representative and I just want to
20 confirm that that's the party's understanding, as well; that
21 that prohibition applies to trial and not necessarily to an
22 evidentiary hearing.

23 Ms. Manes?

24 MS. MANES: Yes, Your Honor. And it was on that
25 basis that we withdrew our objection to having Mr. Asphaug

1 and Ms. Marshall act as counsel at the continuation hearing.

2 We, after initially meeting and conferring and also
3 reviewing this Court's order, last Tuesday we did some
4 further analysis and review of the rule and the various
5 opinions on it, and it's our understanding that that rule
6 only applies in a trial session -- situation, not in an
7 evidentiary hearing situation.

8 I do think there are two other issues regarding the
9 evidentiary hearings which are to be addressed -- need to be
10 addressed at this time.

11 THE COURT: That's Mr. Williams?

12 MS. MANES: Not Mr. Williams. I believe it's the
13 information regarding Detective Steele. From the defense
14 perspective, we believe he's a government agent. The
15 Government should either produce him or make the
16 affirmatively required showing that he is, in fact,
17 asserting his Fifth Amendment privilege against not
18 testifying.

19 And then also just from Mr. Pedersen's perspective, we
20 have already issued some subpoenas for the attendance of
21 witnesses on March 11th and 12th. Our section of the
22 hearing will now be in April. We will seek an order to
23 continue our subpoenas, and then we will be writing letters
24 to the witnesses to tell them that they do not have to
25 arrive on March 11th, but, instead, on April 7th.

1 THE COURT: That oral motion, as such, will be
2 granted.

3 MS. MANES: Thank you, Your Honor.

4 THE COURT: All right. When you say it didn't
5 pertain to Mr. Williams, do I understand that you still
6 desire to call Mr. Williams as a witness?

7 MS. MANES: Yes, we do. But the issue of having
8 him act as counsel does not pertain to him testifying.

9 THE COURT: All right. Mr. Asphaug, as to the
10 availability of Detective Steele, or, Ms. Shoemaker, have
11 you been able to determine that?

12 MR. ASPHAUG: I have not, Your Honor. I
13 understand that a -- that a public announcement related to
14 the ongoing criminal investigation of Mr. Steele is
15 forthcoming; however, Mr. Steele remains represented by
16 counsel. Both counsel for the defense and the Government
17 sought some information just as late as last week from
18 counsel for Mr. Steele related to whether he would be
19 available. We have been told nothing in response to that.

20 So we will continue to pursue that, and I think we can
21 answer that question by next week's hearing, which is the
22 evidentiary portion, and he would not be called, I'd
23 understood, until the following piece of -- in April.

24 MS. MANES: I believe that the issue of
25 destruction of evidence would be relevant to the -- the bad

1 faith issues regarding discovery issues, and, therefore,
2 I -- I was under the impression that Detective Steele was
3 viewed as a necessary witness for both sessions of the
4 hearing.

5 MS. CORRELL: I was, as well, Your Honor.

6 THE COURT: Well, in that regard, the best way to
7 find out is if the defendants either jointly or separately
8 issued a subpoena to Detective Steele. You would be advised
9 as to whether or not he would, in fact, appear at the
10 hearing we have scheduled. I guess it's March 11th and
11 12th.

12 MS. MANES: We can certainly endeavor to do so,
13 Your Honor, but that's -- that's part of the problem that we
14 are -- we are faced with.

15 Detective Steele has acted as an agent of the United
16 States Attorney's Office at all points in time relevant to
17 this. He is a party witness. He is not an independent
18 witness. We think it's the Government's obligation to
19 present him as a witness to substantiate their good faith.

20 We will certainly ask the marshals to attempt to
21 subpoena him. Their ability to do so between now and
22 March 11th, I'm not sure that I can -- I can confirm, but we
23 will make that effort.

24 But we just want the record to be clear that it's our
25 position he's acted as an agent. He's never acted as a

1 private individual in relation to his actions in this case.
2 It's incumbent upon the Government to present their agents.
3 Just as they're presenting Ms. Shoemaker and Ms. Horsley. I
4 do not have to subpoena them to obtain their presence in
5 this courtroom. They're already before this Court as an
6 agent of the parties.

7 THE COURT: Mr. Asphaug?

8 MR. ASPHAUG: I don't disagree with what she said.
9 Mr. Steele is no longer on the prosecution team. During the
10 time he was, he certainly was an agent of the United States.

11 On the other hand, Mr. Steele, like all individuals,
12 have a right to counsel. He's exercised that right, and
13 he's effectively removed himself from our direct contact
14 under the rules of professional responsibility.

15 I will endeavor to seek Mr. Staropoli,
16 Michael Staropoli is his attorney. And I can ask
17 Mr. Staropoli to take a position one way or the other --

18 THE COURT: That's --

19 MR. ASPHAUG: -- by Thursday of this week, and
20 we'll know if that's satisfactory.

21 THE COURT: All right. I don't know if the
22 parties have actually stated the status of the discovery
23 audit.

24 Would that be Ms. Shoemaker? Did you indicate where we
25 are with respect to that?

1 MS. SHOEMAKER: Your Honor, I can say it's still
2 ongoing. And at the hearing next week Susan Cooke will be
3 testifying as a witness and can address that in detail.

4 But, as I mentioned earlier this morning, at this point
5 we have removed all evidence and reports from OSP and have
6 that in our possession, and we've made that available for
7 the defense to inspect, the 27 boxes that were removed from
8 the Cave area and other work areas, and we will be -- we had
9 to suspend the audit of the materials in FBI's custody in
10 order to complete that OSP portion of the audit. Ms. Cooke
11 will be resuming that; but, in the meantime, we've also made
12 that material available for inspection by the defense.

13 And I should note, for the record, that from the
14 beginning of the case, early in the case, we advised the
15 defense that they were able to make appointments with the
16 FBI to inspect the evidence that is in their custody.

17 So the audit is still ongoing and the specific details
18 will be presented to the Court during the evidentiary
19 hearing next week. We're hopeful that in the very near
20 future all the discovery will have been completed. But we
21 are still going back and reviewing all the reports to ensure
22 that, you know, whatever may be missing, that we can track
23 that evidence down or attempt to track that evidence down
24 and provide everything as promptly as we're able.

25 THE COURT: Ms. Correll?

1 MS. CORRELL: Your Honor, just in regard to the 27
2 boxes, I -- it may be that there's a fair chunk of that
3 material that is duplicative of what we've already received.
4 The fact of the matter is we still have to go through 27
5 boxes of material, page by page, to make -- it's not such an
6 easy determination to make. And just that process -- I
7 mean, 27 boxes, you can figure, would take up a good chunk
8 of this middle area.

9 So, again, I would just like to state I still think
10 that's an enormous amount of material for us to go through,
11 given the current scheduling date the Court is contemplating
12 for the July 7th trial date.

13 THE DEFENDANT: Judge Haggerty?

14 THE COURT: Just one second, Mr. Pedersen, before
15 I forget this thought.

16 Going back to something I had mentioned earlier, there
17 was an objection by the Government to either Ms. Marshall or
18 Mr. Williams be called as a witness. The Court is not
19 exactly clear as to the basis of the Government objection.

20 MR. ASPHAUG: Twofold, Your Honor. First, the
21 pleadings filed by the defense would indicate, at least
22 initially, that the purpose of calling U.S. Attorney
23 Marshall was because she signed a pleading that relied on
24 the declarations of --

25 THE COURT: Ms. Horsley.

1 MR. ASPHAUG: -- AUSA Shoemaker and AUSA Horsley.
2 I found no basis by which a litigant who files a pleading
3 relying on the declarations of others makes him or herself
4 available as a witness for that purpose. So we objected on
5 the fact that simply filing a pleading does not make a
6 person a witness.

7 In response to that, Defendant Pedersen's counsel
8 suggested it was a supervisory question that -- whether the
9 United States Attorney's Office was exercising adequate
10 supervision over the AUSAs in the case.

11 To address that issue, the United States now withdraws
12 its objection to Criminal Chief Bill Williams becoming a
13 witness. Criminal Chief Bill Williams can testify to all
14 management decisions, and all issues related to supervision
15 of the AUSAs assigned to the case.

16 And so for two reasons: One, there's no basis to call
17 the United States attorney as a litigant in a 501 pleading;
18 and, secondly, calling Mr. Williams obviates the need to
19 call Ms. Marshall, and any additional testimony of
20 Ms. Marshall would be simply duplicative and accumulative of
21 what management's position is as stated by Mr. Williams. So
22 those are our objections.

23 THE COURT: Ms. Manes?

24 MS. MANES: Yes, Your Honor. The issues of the
25 evidentiary hearing in April will relate to interference

1 with the Sixth Amendment privileges of Mr. Pedersen that we
2 believe was ongoing for more than two years and also relate
3 to the issues of candor with the parties and the tribunal
4 once those issues began to come to light.

5 Once the fact that there had been some interference
6 with Mr. Pedersen's Sixth Amendment rights to consult and
7 confer in confidence with the members of his defense team
8 came to light, was the United States Attorney's Office
9 compliant with their ethical and, we believe, legal
10 obligations both under the applicable case law, which we
11 will certainly be briefing before and after the hearing,
12 under the United States Department of Justice's policies for
13 their own conduct and under the Oregon Rules of Professional
14 Conduct were they forthcoming with the Court.

15 Both Assistant U.S. Attorney and Chief of the Criminal
16 Division Mr. Williams and also Assistant U.S. Attorney
17 Ms. Marshall filed pleadings with this Court making
18 affirmative representations to this Court and to counsel for
19 Mr. Pedersen that there have not been interference with
20 Mr. Pedersen's Sixth Amendment right to counsel by obtaining
21 confidential communications. Those were filed last July.

22 At that point in time we can prove and will be able to
23 prove that there was significant interference, almost a
24 hundred phone calls, over 20 letters, analysis of
25 Mr. Pedersen's interactions with his mitigation specialist.

1 All of these were in the hands of the U.S. Attorney's Office
2 at that point in time.

3 We believe the ethical rules and, in particular, also
4 Federal Rule of Civil Procedure 11, which we do believe is
5 applicable in criminal cases -- and we can brief that
6 issue -- places affirmative obligations on individuals
7 signing pleadings before this Court to make a reasonable
8 inquiry into the truth of the facts they are representing to
9 the Court and to have a reason to believe that what they are
10 saying is true.

11 Mr. Williams and Ms. Marshall's reasons to believe
12 these representations, which we can prove were, in fact,
13 untrue, are certainly at issue in terms of the questions of
14 the Government acting in good faith both at the time of
15 interfering with Mr. Pedersen's Sixth Amendment rights and
16 at the time when that interference came to be known by this
17 Court and counsel for the defense, to act with candor,
18 truth, and be forthcoming about what had happened. We think
19 all of those issues relate to the good faith and all of
20 those issues are things we should inquire into.

21 We also do believe that there are issues regarding the
22 supervision of the U.S. Attorney's Office. And while we
23 certainly would like to inquire with Chief Deputy Williams
24 about that, we would also like to inquire with Ms. Marshall.
25 She is, after all, the U.S. Attorney. She is ultimately

1 responsible.

2 That's why we believe they are necessary witnesses. We
3 are certainly willing to also allow them to be counsel under
4 the provisions of the Professional Rules of Conduct, and
5 that's our position.

6 I do have one additional issue on another matter we
7 talked about that just occurred to me. I would like to ask
8 the Court to order the United States Attorney's Office to
9 make available to us Detective Steele's home address for
10 issuance of a subpoena.

11 Most law enforcement officers in the state of Oregon
12 are able to keep their home address out of the public
13 record. He is, of course, no longer at his employment
14 address, which will make it somewhat difficult for us to
15 obtain service of a subpoena. But if they can provide us
16 with his home address, we will certainly endeavor to do so.

17 THE COURT: If he's represented by counsel, have
18 you considered conferring with counsel to see if the
19 attorney would accept the subpoena?

20 MS. MANES: We have attempted, as Mr. Asphaug has
21 said, to confer with counsel. I don't think any of us
22 received a response to our inquiries to that counsel.

23 We could certainly subpoena counsel's address,
24 but -- but counsel, of course, not Mr. Steele. And if he
25 does not want to cooperate with us, which, at the moment, he

1 is not cooperating with either the defense or the United
2 States Attorney's Office -- it places us in a bit of a
3 conundrum.

4 MR. ASPHAUG: I'm confident that Mr. Staropoli, as
5 an officer of the court, would accept service of a subpoena
6 of his client in this matter if it's necessary, especially
7 if the Court were to direct that to happen. There's no need
8 to provide Mr. Steele's address, whether we even have it, to
9 the defense in this case.

10 MS. MANES: If we can all agree that service on
11 Mr. Staropoli will be service on Mr. Steele, we'll accept
12 that representation.

13 THE COURT: I haven't made that representation.

14 MS. MANES: We would accept that. We're willing
15 to do whatever we can do. We're willing to serve
16 Counsel Staropoli, but if our obligation is going to serve
17 Counsel Steele, the reality is that because he has been a
18 law enforcement officer he has been able to keep his address
19 out of all of the types of databases that we would normally
20 utilize in order to locate and subpoena a witness.

21 THE COURT: I merely suggested that as a
22 possibility.

23 Inquire and we'll take it up, if necessary, in another
24 fashion, if the attorney's incapable of accepting service on
25 behalf of his client.

1 MR. ASPHAUG: If I could briefly just respond --

2 THE COURT: You may.

3 MR. ASPHAUG: -- related to the United States
4 Attorney Marshall?

5 First, Rule 11 clearly sets forth that attorneys can
6 rely upon the declarations of others. It's in Section 2B
7 and 2C, I believe. And as for the supervisory issue at
8 issue that counsel is talking about, we've already proposed
9 that the -- a member of the management team is available to
10 testify to all the concerns that she's raised.

11 Her answer that, "Well, we want to talk to both," just
12 really clearly points out the fact that this is just a
13 fishing expedition, and if they're not satisfied with the
14 answer of Ms. Marshall, then they'll probably want to
15 subpoena Attorney General Holder and then President Obama,
16 too.

17 So, I mean, it all -- at some point there has to be a
18 decision made as to what's relevant testimony and what's
19 cumulative testimony. We believe that by offering
20 Chief -- Criminal Chief Williams to offer the full synopsis
21 of everything that management was doing, that's adequate for
22 this Court's determination by both relevancy and good faith
23 finding in this matter.

24 THE COURT: Okay. Ms. Correll, did you wish to be
25 heard on these latter points?

1 MS. CORRELL: No, Your Honor. I'll join
2 Ms. Manes's arguments.

3 THE COURT: Yes. Mr. Pedersen, I said I would
4 come back to you, but you're now represented by counsel. Is
5 this something that you can't confer with your attorney and
6 have them state your position?

7 THE DEFENDANT: I could if -- if the Court really
8 wanted me to; but, frankly, I'm the only person in this
9 courtroom, outside of the box back here, that is opposed to
10 a continuance, and so I don't know that they would
11 forcefully or --

12 THE COURT: Well, they've stated your objection to
13 a continuance, and at this point in time I have denied that
14 request. However, I have to leave open the fact that it may
15 surface that these materials are just not capable of being
16 reviewed in a time frame that would allow the Court to
17 maintain these scheduled trial dates. Obviously, I'm going
18 to try and keep that trial date, but I have to consider
19 things as they are presented to me.

20 So I understand that you object to a continuance and at
21 this moment I have denied that request, but I have to leave
22 the door open for a future request if presented.

23 THE DEFENDANT: No, and I heard -- I heard the
24 Court's denial, but then I heard a couple other individuals
25 continue to speak on the issue, and so I just wanted to be

1 sure that I would be able to, you know, make my position
2 known, very briefly, since everyone else has gotten to speak
3 on it, even though it was already denied.

4 You know, basically I'm ready for trial and my counsel
5 are ready for trial, and it seems unjust, to me, to delay
6 the proceedings, where I'm concerned, when I am firm in my
7 resolve to go to trial, so counsel for a defendant who
8 likely won't even see trial can have a bit more time.

9 I understand the desire to reach a global resolution,
10 perhaps, for Ms. Grigsby, as well as go through some
11 discovery, but it doesn't make a lot of sense, to me, to
12 grant a couple more months for resolving something that
13 could be done in two or three months.

14 If -- if that is the case, though, if certain
15 individuals need more time to go over discovery, enjoy their
16 summer vacations, or whatever their motivating factors are
17 here, I would put to the Court that it might be a good idea
18 to grant a severance, and I know typically courts are
19 loathed to do that, but I think the primary reasons for that
20 are costs and time involved in running two trials rather
21 than one. But here that wouldn't be an issue because
22 Ms. Grigsby is not likely to see a trial. So perhaps we
23 could grant a severance, give them the time they need, and
24 maintain my July trial date. I think that might be the best
25 solution.

1 THE COURT: Well, that's something the Court and
2 my law clerks have discussed, but, as yet, that was
3 something that the Court was not prepared to do either.

4 THE DEFENDANT: Okay.

5 THE COURT: Ms. Manes?

6 MS. MANES: Nothing further, Your Honor.

7 THE COURT: Okay. Are there any other issues that
8 the parties wish to present at this time?

9 MR. ASPHAUG: Just a couple of things, Your Honor;
10 housekeeping matters. In the -- in the joint status report
11 filed Friday, we did indicate that they -- we were arranging
12 a date for the defense to review the work area at the Oregon
13 State Police headquarters. That has been done. We are
14 meeting there tomorrow at 3:30.

15 The other issue that I don't think we need to address
16 today, but I want to put on the record, is that the -- we do
17 agree that the hearing to be conducted next week, the 11th
18 and 12th, should be an open hearing.

19 The statement goes on to say, however, that the
20 April 7th through 9th period would be sealed. The
21 Government believes that portions should be in nonpublic
22 forms when issues specifically related to, in fact,
23 privileged communications are discussed, but we don't
24 believe that the entirety of that hearing in April
25 necessarily needs to be under seal.

1 It's going to be -- we would argue a witness-by-witness
2 determination. That's it.

3 THE COURT: Anyone wish to be heard on that point?

4 MS. MANES: I mean I think we could certainly
5 discuss with the Government how if there was a desire by the
6 Government to have portions of the April 7th to 9th hearing
7 unsealed, how we could accomplish that. I -- I understand
8 their position. We kind of will have to weave in and out of
9 communications that are privileged at the time of the
10 hearing so it may involve some logistics, which I certainly
11 think that we can perhaps work out by the time of the
12 hearing that's coming up in April.

13 My only other housekeeping issue was that I did just
14 want to put on the record that the Government -- there were
15 several requests for additional documents following on the
16 first production of the filter team items such as more
17 legible copies of various documents that were provided.

18 Mr. Asphaug has assured us that the Government would
19 be -- to the extent there are documents available, providing
20 them to us. I would just like an order that they be
21 provided by the end of the week so we have time to prepare
22 for the hearing next week.

23 MR. ASPHAUG: To the extent they're available,
24 they will be made available to the defense by the end of the
25 week, and we'll address a letter to the parties about what

1 is not available.

2 THE COURT: Ms. Correll, anything?

3 MS. CORRELL: No, Your Honor.

4 THE COURT: In an unrelated matter, Mr. Wolf, did
5 the matter in Clackamas County resolve?

6 MR. WOLF: It did not resolve, Your Honor;
7 however, it -- the Court did grant a continuance of
8 Mr. Rogers' trial. A new date has not been selected.

9 THE COURT: Okay. But you don't know if it's
10 going to conflict with this scheduled trial date?

11 MR. WOLF: It will not conflict with this
12 scheduled trial date.

13 THE COURT: Okay. That's all I needed to know.

14 Unless there's any other matters, we'll continue this,
15 I guess, until next week.

16 All right. We'll be in recess

17 (Hearing concluded.)

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25

C E R T I F I C A T E

1 UNITED STATES OF AMERICA,)
2)
3 Plaintiff,) Case No. 3:12-CR-00431-HA
4)
5 v.)
6)
7 DAVID JOSEPH PEDERSEN, a/k/a)
"JOEY" PEDERSEN, and HOLLY ANN)
GRIGSBY,)
8 Defendants.)
_____)
9

MOTION HEARING

March 3, 2014

13 I certify, by signing below, that the foregoing is
14 a true and correct transcript of the record of proceedings
15 in the above-entitled cause. A transcript without an
16 original signature, conformed signature, or digitally signed
17 signature is not certified.

18
19 /s/Jill L. Erwin, CSR, RMR, RDR, CRR

Official Court Reporter

Date: March 10, 2014